IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

RPFC.No. 65 of 2001()

MC.844/1999 OF OF THE FAMILY COURT, MANJER
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REVIEW PETITIONERS: PETITIONERS :
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1. AMINA, W/O.MOOSA AND D/O.MR.MAMMADISHA HAJI M.C., ALUNGAPARAMBU HOUSE, OLAVATTUR AMSOM, P.O.OLAVATTUR, ERNAD TALUK, MALAPPURAM DISTRICT, PIN 673 638.

2. JAMSHID, AGED 16 YEARS, S/O.AMINA, ALUNGAPARAMBU HOUSE, OLAVATTUR AMSOM, P.O.OLAVATTUR, VIA KONDOTTY, MALAPPURAM DISTRICT, PIN 673 638.

3. RAJEENA, AGED 12 YEARS, D/O.AMINA, ALUNGAPARAMBU HOUSE, OLAVATTUR AMSOM, P.O.OLAVATTUR, VIA KONDOTTY, MALAPPURAM DISTRICT, PIN 673 638. (REPRESENTED BY GUARDAN SMT. AMINA (MOTHER).

BY ADV. SRI.SEBASTIAN THARAKAN
SRI.PAULY MATHEW MURICKEN

RESPONDENTS:

MOOSA, S/O.KADIKUTTY HAJI, THALIYACHOLA HOUSE, OLAVATTUR AMSOM, P.O.OLAVATTUR, ERNAD TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI.K.P.MUJEEB

THIS REV.PETITION(FAMILY COURT) HAVING BEEN FINALLY HEARD ON 23.3.2007 ALONG WITH RPFC NO. 41 OF 2002 THE COURT ON 23/03/2007 PASSED THE FOLLOWING:

K.HEMA, J.

R.P.(F.C).NO. 65 OF 2001
&
R.P.(F.C).No. 41 of 2002

Dated this the 23rd day of March, 2007

O R D E R

Revision petitioners in R.P.(F.C).No.65 of 2001 are the wife and children. The respondent therein is the husband and the father of the petitioners. The petitioners filed a petition under Section 125 Code of Criminal Procedure ('the Code', for short) claiming maintenance from the respondent. The court below, after enquiry, passed an order granting maintenance to the children, petitioners 2 and 3 at the rate of Rs.400/- per month from the date of petition. It is further found that the first petitioner- wife is not entitled to any maintenance. The wife and the children filed R.P.(F.C).No.65 of 2001 and the husband filed R.P.(F.C).No.41 of 2002 challenging the very same order.

2. The wife challenges refusal to grant order of maintenance in her favour, whereas the husband challenges the quantum of maintenance granted in favour of the children. Both these revisions are hence disposed of by this common order.

3. Facts can be stated briefly as follows: A petition was filed

by the petitioners, wife and children against the respondent alleging that the marriage between the first petitioner and the respondent took place in 1983 and the respondent ill treated the first revision petitioner and they started living separately. On 3.5.1998, the petitioners left the house of the respondent. The first revision petitioner was having cardiac decease and she also underwent major surgery, but the respondent neglected to maintain her or meet any expenses. The petitioners are not having any means and they are unable to maintain themselves. The respondent is having sufficient means from various sources. He is having business in arecanut and he gets Rs.5,000/- per month. He has other landed properties also which are proved by Exhibits P7 to P15, from which he is getting an income of Rs.6,000/-. The petitioners require maintenance at the rate of Rs.5,000/- per month.

4. On an analysis of the evidence, the court below found that the respondent-husband has sufficient means. It was also held that the petitioners are unable to maintain themselves. The findings are entered on the basis of both oral and documentary evidence and certain admissions made by the respondent. I do not find any reason to interfere with such findings, since no perversity is pointed out in such findings. Learned counsel for the respondent-husband contended that the respondent is only a coolie and gets only a

meagre amount as income. But on the basis of the documentary evidence revealing that the respondent is having landed properties, the court has arrived at a finding that the family of the respondent is an affluent circumstances with large number of properties and Exhibits P1 to P10 would also show that the respondent has got some properties and he is having enough means to provide maintenance to the children. There is no reason why the evidence of PW1 and the documentary evidence should be discarded. The court below has rightly held that the respondent is having sufficient means.

5. The most vital aspect to be considered in this case is whether the respondent has neglected to maintain the petitioners. The respondent has no case that he had been paying any maintenance to the wife ever since she had started living separately from him with the children. Much prior to the filing of the maintenance petition itself, the parties were living separately. It has come out in evidence and also from the admissions made by RW1 that PW1 is having cardiac disease and she had to undergo operation. Necessarily, this would incur heavy expenditure. But there is absolutely nothing on record to show that the respondent had at any time met the expenses, except a bare assertion that he had paid the amounts for medical expenses.

6. Having failed or neglected to pay maintenance to the wife and children, after the parties are separated, it has to be held that the petitioners have proved that the respondent neglected to maintain them. In the absence of anything on record to show that the respondent paid any maintenance to the wife, it cannot be said that the husband has been looking after the wife and children. But on the other hand, the evidence indicates that the respondent neglected to maintain the petitioners, as revealed from his own evidence that he had not been looking after them after the separation.

7. Under Section 125(1) of the Code, to grant an order of maintenance allowance, it is sufficient if a wife and child prove that they are unable to maintain themselves and the husband or the father having sufficient means have neglected to maintain them. Nothing more is required to prove for the court to pass an order of maintenance allowance under Section 125(1) of the Code. Therefore, the petitioners have established on the requirements under Section 125(1) to get maintenance allowance as prayed for. However, sub-section (4) of Section 125 of the Code shows that no wife will be entitled to receive maintenance allowance or interim maintenance from the husband if she is refusing to live with the husband without any sufficient reason.

8. The husband has made an offer at the time of evidence and also in the counter statement that he would maintain the first petitioner-wife and the children on condition that the wife lives with him. The case of the respondent is that in spite of this offer, the wife is refusing to live with him, without any sufficient reason. But PW1 deposed that she is prepared to live with the husband provided, an accommodation is provided by the respondent, close to the vicinity of her parental house. So it cannot be said that there is refusal to live with the husband. When there is no total refusal to live with the husband, there is no question of looking into the cause or reason for the refusal.

9. It is only in cases where the wife refuses to live with the husband, that the court is bound to consider whether the wife is refusing to live with the husband without any sufficient reason. But in this case the wife having admitted that she is prepared to live with the husband. The refusal, if any, on the part of the wife to live in the place suggested by him is not quite relevant to refuse maintenance. The question is whether she is willing to resume cohabitation with him as husband and wife and not where she is going to live with him.

10. It is also relevant to note in this context that the husband has, admittedly, contracted another marriage. He admitted that he

married another woman about one year back, when the marriage between him and the first petitioner subsisted. The parties are Muslims. Despite the second marriage of the husband the wife is prepared to live with him provided he puts up a residence for her to live with him, close to the first petitioner's parents' house. This request,on the facts and circumstances of the case, cannot be said to be unjustifiable. As per the evidence, the wife is a heart patient who needs support not only financially, but by the care of kith and kin. In the peculiar circumstances, in which the first petitioner is placed, the suggestion made by her that a house may be put up close to her parents' house cannot be said to be justified. It appears that the respondent was insisting her to go with him in his residence.

11. Learned counsel for the respondent argued that the husband has offered to maintain the wife on condition that she lives with him in his house. It is the case of the respondent that the wife is bound to live with the husband, failing which the husband is not liable to maintain her. The refusal on the part of the wife to live with the husband in his house, it is submitted, is a ground to refuse maintenance to the wife, since her refusal to live with the husband is without any sufficient cause. I am unable to accept this argument. No wife can be compelled to live with the husband who has contracted another marriage, even if the parties are Muslims.

Though the personal law of parties permits more than one marriage for the husband, going by the provisions contained in Section 125 of the Code, contracting a marriage with another woman or keeping a mistress shall be considered to be a just ground for refusal of the wife to live with the husband. The wife is entitled to refuse to live with the husband on the ground of contracting of a second marriage itself. But here is a wife who has agreed to live with him, provided a separate residence is provided to her. Therefore, the request made by the wife to provide a house near to her parents' house cannot be made a ground to disentitle her from getting maintenance. As already stated by me earlier, in cases where there is no refusal to live with the husband, the question whether there was any sufficient reason for refusal does not arise. The reason which a wife to show or establish under Section 125(1) of the Code is the reason for refusal to live with her husband. Here, such a reason does not arise, since there is no refusal to live with the husband. The first petitioner cannot, therefore, be disentitled for monthly allowance from the husband by virtue of sub-section (4) of Section 125 of the Code. Even if there is a bonafide offer, despite the second marriage the wife is entitled to refuse to live with the husband and still claim separate maintenance if the husband has contracted a second marriage.

12. In the above circumstances, the order passed by the court below refusing maintenance to the wife is unsustainable. The court below has found fault with the wife in insisting the husband to provide a house close to her parents' house. The court below was of the view that such request is not bonafide. The court has not taken into consideration the fact that a wife cannot be compelled to live with the husband under the same roof where a second wife is living. Since Section 125 itself indicates that she can refuse to live with the husband if the husband has contracted a second marriage, a refusal to live with such a husband under the same roof cannot be made a ground to reject her claim for maintenance. The court below committed an illegality in refusing maintenance to the wife.

13. Learned counsel for the respondent-husband argued that petitioners 2 and 3 children have attained majority. Therefore, they are not entitled to get maintenance. It is also submitted that the amount ordered is too high. On considering the means of the husband from landed properties etc., the amount ordered cannot be said to be exorbitant, while considering the need of the children and the means of the husband. If the husband has a case that the children are not entitled for maintenance, he has to get the order cancelled by making an application for cancellation under Section 127 of the Code. Learned counsel for the revision petitioners

submitted that only because the children have attained majority, maintenance order cannot be cancelled. Other factors also require consideration at the appropriate stage in an appropriate proceedings.

14. The wife, as per the evidence, is a heart patient requiring a good amount for meeting medical expenses. She needs food, clothing etc. She is totally depending upon her near relatives for her subsistence. The husband is having sufficient means and he has neglected to maintain her who is unable to maintain herself. In the above circumstances, I find that an order can be passed allowing maintenance to the first petitioner at the rate of Rs.400/- per month. The respondent shall make such monthly allowance and pay the same to the first revision petitioner. I do not find any reason why for fixing a monthly allowance alone the matter should be remanded to the trial court, especially since evidence is available to fix the quantum.

R.P.(F.C).65 of 2001 is allowed and R.P(F.C).No.41 of 2002 is dismissed.

K.HEMA, JUDGE

vgs.